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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE,

Plaintiff and Respondent,

v.

LARRY AUSTIN,

Defendant and Appellant.

B210694

(Los Angeles County
Super. Ct. No. BA278901)

APPEAL from a judgment of the Superior Court of Los Angeles County, Carol H. Rehm, Jr., Judge. Reversed.

Gerald Peters, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown, Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Kenneth C. Byrne, Supervising Deputy Attorney General, and Eric J. Kohm, Deputy Attorney General, for Plaintiff and Respondent.

Larry Austin appeals from the judgment entered following an order revoking his probation. He contends that order is invalid because it was entered after his probationary term had expired. We reverse.

BACKGROUND

On April 7, 2005, defendant entered a negotiated plea of guilty to failing to update his registration as a sex offender, received a suspended sentence of three years, and was placed on formal probation for a period of three years subject to various terms and conditions. Thereafter, probation was revoked on September 17, 2007, and reinstated on October 3, 2007 (16 days), and revoked a second time on January 16, 2008 and reinstated on February 20, 2008 (35 days).

On June 3, 2008, the People filed a request to revoke defendant's probation based on a May 31 incident in which defendant allegedly sold marijuana to a plainclothes police officer and resisted arrest. On August 21, 2008, defendant appeared for a hearing on the probation violation as well as a pretrial hearing on a separate prosecution based on the May 31 incident. Defendant filed a motion to continue the probation violation hearing, arguing that the appropriate procedure would be to have it follow the "open case." The prosecutor opposed the motion, noting that he had "advised counsel early on that we intended to proceed by way of probation violation." The prosecutor further explained that given the three-year suspended sentence on the probation violation, he intended to dismiss the open case upon revocation of defendant's probation.

The court denied defendant's request for a continuance, and the matter proceeded to a contested hearing on the probation violation. Upon completion of the evidence and closing arguments, defense counsel told the court that defendant told him probation expired on April 8, 2008, and "[defendant] feels, therefore, on that basis he is not in violation." Defendant personally added that he had "no paperwork" on his probation dates. The court stated: "That is fine, but this court has in its file numerous probation officers' reports noting that your probation expiration date because of your previous violations was June 8, 2008, a month roughly after these events occurred." Defendant

was then found in violation of probation and sentenced to three years in state prison. The pending criminal prosecution was dismissed under Penal Code section 1385.

DISCUSSION

As a general rule, if acts that would constitute a violation of probation occur after the probationary term has expired, the court has no jurisdiction to revoke probation and the defendant is entitled to an order discharging him from probation. (*People v. Tapia* (2001) 91 Cal.App.4th 738, 742.)

The Attorney General concedes that given the 16- and 35-day tolling periods when probation had been revoked, defendant's probationary term was extended from April 8 to May 29, 2008, when it expired. Accordingly, the trial court was incorrect in concluding that the term did not expire until June 8, 2008.¹ And as such, defendant's May 31 conduct in violation of probation did not occur until after his properly calculated probationary term had expired.

But citing *In re Griffin* (1967) 67 Cal.2d 343 (*Griffin*), the Attorney General contends that defendant is estopped from asserting that the trial court lacked jurisdiction to revoke his probation. We disagree.

In *Griffin*, the defendant's term of probation was set to expire on July 23, 1966. At a violation hearing on July 5, the defendant requested and was granted a continuance of the hearing to August 2, 1966. No mention was made of the July 23 expiration date. Following the continued hearing, at which probation was revoked, the defendant argued for the first time that the trial court lacked jurisdiction to violate probation because the term had expired. (*Griffin, supra*, 67 Cal.2d at p. 345.) "After further hearings the court determined that on July 5, when [the defendant] requested a month's continuance, he knew that the probationary term would end on July 23, and that by knowingly seeking and obtaining the continuance beyond the termination date he waived his right to insist on the jurisdictional nature of timely revocation of probation." (*Ibid.*) The defendant's

¹ The record does not reflect how the June 8 date had been calculated.

challenge to this ruling was rejected, the Supreme Court holding that “[w]hen, as here, the court has jurisdiction of the subject, a party who seeks or consents to action beyond the court’s power as defined by statute or decisional rule may be estopped to complain of the ensuing action in excess of jurisdiction. [Citations.]” (*Id.* at pp. 347–348.)

The Attorney General argues that *Griffin* should be applied in this case because defendant “consented to action beyond the court’s power when he filed a motion to continue the probation violation hearing to a date further beyond the expired probationary term. [Defendant] further helped invite any error following the denial of his motion to continue when he agreed to proceed, knowing that the People were proceeding with the probation violation hearing in lieu of proceeding on the open case. . . . [Defendant] should not be permitted to profit from his silence regarding the expired period while the People agreed not to proceed on the open case.”

We are unable to perceive how a request made *after* the term of probation had expired to continue the violation hearing could estop defendant from complaining that the court lacked jurisdiction to conduct the hearing at a later date. Nor does the record suggest that defendant gained any unfair advantage by not raising the jurisdictional issue until after evidence had been adduced on the violation. The question of whether the probationary term had expired was raised and rejected on the merits *before* the open case was dismissed. Having heard the argument that the probation term had expired, the People had full opportunity to dismiss the probation violation and proceed on the open case. Defendant played no role in the People’s and the trial court’s failure to realize that the incident that brought rise to the violation itself, as well as all the pertinent ensuing events, had occurred after the probationary period had already ended.

DISPOSITION

The judgment is reversed.
NOT TO BE PUBLISHED.

MALLANO, P. J.

We concur:

ROTHSCHILD, J.

JOHNSON, J.